

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS**

Case No. 02-4084-JAR

Defendant.

MEMORANDUM & ORDER

Plaintiff Susan G. Stinson brings this action pursuant to 42 U.S.C. § 405(g) seeking judicial review of Defendant Commissioner of Social Security’s denial of her application for a period of disability and disability insurance benefits under Title II of the Social Security Act (Act) and supplemental security income under Title XVI of the Act. According to plaintiff, defendant failed to properly evaluate plaintiff’s credibility and erred in finding plaintiff capable of performing work in significant numbers in the national economy. As explained in more detail below, the Court concludes that the decision, in part, is not based on substantial evidence, and therefore the Court reverses and remands this case.

I. Procedural Background

On February 4, 1998, plaintiff filed her applications for a period of disability, disability insurance benefits, and supplemental security income, claiming disability since January 4, 1998, due to a ruptured vertebra and a herniated disc. The application was denied both initially and upon reconsideration. At plaintiff's request, an administrative law judge (ALJ) held a hearing on December 1, 1998, and a

supplemental hearing on May 10, 1999. On May 26, 1999, the ALJ rendered a decision denying all benefits, on the basis that plaintiff was not under a “disability” as defined by the Social Security Act. After the ALJ’s unfavorable decision, plaintiff requested review by the Appeals Council; her request for review was denied on April 19, 2002. Thus, the ALJ’s decision is the final decision of defendant.

II. Standard of Review

Judicial review under 42 U.S.C. § 405(g) is limited to whether defendant’s decision is supported by substantial evidence in the record as a whole and whether defendant applied the correct legal standards.¹ The Tenth Circuit has defined “substantial evidence” as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”² In the course of its review, the court may not reweigh the evidence or substitute its judgment for that of defendant.³

III. Relevant Framework for Analyzing Claim of Disability and the ALJ’s Findings

“Disability” is defined in the Social Security Act as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment”⁴ The Social Security Act further provides that an individual “shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial

¹See *White v. Massanari*, 271 F.3d 1256, 1257 (10th Cir. 2001) (citing *Castellano v. Sec’y of Health & Human Servs.*, 26 F.3d 1027, 1029 (10th Cir. 1994)).

²*Id.* (quoting *Castellano*, 26 F.3d at 1028).

³ *Id.*

⁴*Williams v. Bowen*, 844 F.2d 748, 750 (10th Cir. 1988) (quoting 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (1982)).

gainful work which exists in the national economy”⁵

The Social Security Administration has established a five-step sequential evaluation process for determining whether a claimant is disabled,⁶ and the ALJ in this case followed the five-step process. If a determination can be made at any of the steps that a claimant is or is not disabled, evaluation under a subsequent step is not necessary.⁷ Step one determines whether the claimant is presently engaged in substantial gainful activity.⁸ If she is, disability benefits are denied.⁹ If she is not, the decision maker must proceed to the second step.¹⁰ Here, the ALJ determined that plaintiff was not engaged in substantial gainful activity and, thus, properly proceeded to the second step.

The second step of the evaluation process involves a determination of whether “the claimant has a medically severe impairment or combination of impairments.”¹¹ This determination, governed by certain “severity regulations,” is based on medical factors alone, and consequently, does not include consideration of such vocational factors as age, education, and work experience.¹² Pursuant to the severity regulations, the claimant must make a threshold showing that her medically determinable impairment or combination of

⁵*Id.* (quoting 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (1982 & Supp. III 1985)).

⁶*See id.* (citing 20 C.F.R. §§ 404.1520, 416.920 (1986)).

⁷*Id.*

⁸*Id.*

⁹*Id.*

¹⁰*Id.*

¹¹*Id.* (quoting *Bowen v. Yuckert*, 107 S. Ct. 2287, 2291 (1987)).

¹²*Id.* (citing 20 C.F.R. §§ 404.1520(c), 416.920(c) (1986)).

impairments significantly limits her ability to do basic work activities.¹³ If the claimant is unable to show that her impairments would have more than a minimal effect on her ability to do basic work activities, she is not eligible for disability benefits.¹⁴ If, on the other hand, the claimant presents medical evidence and makes the de minimis showing of medical severity, the decision maker proceeds to step three.¹⁵ The ALJ in this case concluded that plaintiff had lumbar disc disease and depression, which satisfy the severity requirement and, thus, the ALJ proceeded to step three.

In step three, the ALJ “determines whether the impairment is equivalent to one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity.”¹⁶ If the impairment is listed and thus conclusively presumed to be disabling, the claimant is entitled to benefits.¹⁷ If not, the evaluation proceeds to the fourth step, where the claimant must show that the “impairment prevents [the claimant] from performing work he has performed in the past.”¹⁸ If the claimant is able to perform her previous work, she is not disabled.¹⁹ With respect to the third step of the process in this case, the ALJ determined that plaintiff’s impairments were not listed or medically equivalent to those listed in the relevant regulations. At the fourth step, the ALJ concluded that plaintiff was unable to perform past relevant work.

¹³*Id.* at 750-51 (citing 20 C.F.R. §§ 404.1521(b), 416.921(b) (1986)).

¹⁴*Id.* at 751.

¹⁵*Id.*

¹⁶*Id.* (citing 20 C.F.R. §§ 404.1520(d), 416.920(d) (1986); *Bowen v. Yuckert*, 107 S. Ct. at 2291).

¹⁷*Id.*

¹⁸*Id.* (citing 20 C.F.R. §§ 404.1520(e), 416.920(e) (1986); *Bowen v. Yuckert*, 107 S. Ct. at 2291).

¹⁹*Id.*

Thus, the ALJ proceeded to the fifth and final step of the sequential evaluation process—determining whether the claimant has the residual functional capacity (RFC) “to perform other work in the national economy in view of [her] age, education, and work experience.”²⁰ At that point, the ALJ properly shifted the burden of proof to defendant to establish that plaintiff retains the capacity “to perform an alternative work activity and that this specific type of job exists in the national economy.”²¹ At this step, the ALJ concluded that plaintiff was not disabled, despite having certain non-exertional limitations, and that plaintiff could perform a significant number of jobs in the state and national economies, including order clerk, unit clerk, and production clerk.

IV. Analysis of Plaintiff’s Specific Arguments

In her motion, plaintiff contends that the ALJ erred in finding plaintiff’s subjective complaints of pain not credible; and the defendant failed to satisfy her burden of proving that plaintiff can perform other jobs which exist in significant numbers in the national economy. The Court addresses each of these arguments in turn.

A. Assessment of Plaintiff’s Credibility

Plaintiff contends that the ALJ erred in evaluating her credibility, and in determining her RFC. A claimant’s credibility regarding subjective complaints of pain is to be evaluated using the standards set out in *Luna v. Bowen*.²² The ALJ must consider whether the claimant has a pain producing impairment, and

²⁰See *id.* (quoting *Bowen v. Yuckert*, 107 S. Ct. at 2291).

²¹See *id.* (citations omitted); accord *White*, 271 F.3d at 1258 (at fifth step, burden of proof shifts to Commissioner to show that claimant retains the functional capacity to do specific jobs).

²²834 F.2d 161 (10th Cir. 1987).

if so, whether there is a loose nexus between the pain and the impairment.²³ In this case, plaintiff has a pain producing impairment and there is the requisite nexus between pain and impairment. The ALJ must further consider, based on all the evidence presented, including medical data, objective indications of the degree of pain, and subjective accounts of severity of pain by the claimant, whether the claimant's pain is in fact disabling.²⁴ In addition to objective medical evidence, the ALJ is to consider:

1. [t]he individual's daily activities; 2. [t]he location, duration, frequency, and intensity of the individual's pain or other symptoms; 3. [f]actors that precipitate and aggravate the symptoms; 4. [t]he type, dosage, effectiveness, and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms; 5. [t]reatment, other than medication, the individual receives or has received for relief of pain or other symptoms; 6. [a]ny measures other than treatment the individual uses or has used to relieve pain or other symptoms (e.g., lying flat on his or her back, standing for 15 to 20 minutes every hour, or sleeping on a board); and 7. [a]ny other factors concerning the individual's functional limitations and restrictions due to pain or other symptoms.²⁵

The ALJ may also use such factors as a claimant's persistent attempts to find relief for her pain and her willingness to try any treatment prescribed, regular contact with a doctor, the possibility that psychological disorders combine with physical problems, and subjective measures of credibility that are peculiarly within the judgment of the ALJ.²⁶ Moreover, the ALJ must give specific reasons why he rejects a claimant's subjective complaints of pain.²⁷ Ultimately, credibility determinations "are peculiarly the province of the

²³*Id.* at 164.

²⁴*Id.* at 163.

²⁵Soc. Sec. Rul. 96-7p, 1996 WL 374186 at *3.

²⁶*Luna*, 834 F.2d at 165-66; *Huston v. Bowen*, 838 F.2d 1125, 1132 (10th Cir. 1988).

²⁷*White v. Massanari*, 271 F.3d 1256, 1261 (10th Cir. 2001) (citing *Kepler v. Chater*, 68 F.3d 387, 390-91 (10th Cir. 1995)).

finder of fact,” and should not be upset if supported by substantial evidence.²⁸

A review of the ALJ’s decision in this case reveals that he applied various *Luna* factors in assessing plaintiff’s credibility. While the ALJ found that plaintiff had functional limitations, he did not fully accept her account of the extent of her impairment and its effect on her ability to work. In finding some of plaintiff’s subjective complaints not credible, the ALJ considered a host of factors dictated by *Luna*: the medical evidence included none of the typical signs of chronic musculoskeletal pains; plaintiff had not undergone surgery or inpatient hospitalization; plaintiff was able to sit for over an hour at the administrative hearing with no observable problems; plaintiff’s daily activities were inconsistent with her claims of how pain affects her; no doctors opined that plaintiff is completely unable to work; and there was no evidence that the medications plaintiff took were ineffective or caused side effects. This Court concludes that the ALJ did not err in applying the evidence to these factors, and in finding plaintiff’s complaints partially credible, partially not credible.

The ALJ concluded that there was no objective medical evidence of clinical signs typically associated with chronic musculoskeletal pains such as muscle atrophy, muscle spasms, neurological deficits, positive straight leg-raising, inflammatory signs, or bowel or bladder dysfunction.” In challenging this finding, plaintiff points to evidence that she had muscle spasms, neurological deficits, and positive straight leg-raising. The evidence of muscle spasms, however, is largely plaintiff’s own subjective complaints of muscle spasms. The evidence she points to is her history of complaints reported to treating physicians. Yet, when she complained to Dr. Hull on March 31, 1998, of muscle spasms, he noted that upon

²⁸*Id.* (citing *Kepler*, 68 F.3d at 390-91).

examination, he did not feel any significant muscle spasm. There is one account of muscle spasms observed upon clinical examination. On April 13, 1998, Dr. Diaz noted that plaintiff had cramps and muscle spasms in her legs, but this occurred while he was performing a lumbar myelogram during which he inserted a needle into her spine. But, there is no medical evidence of clinical signs upon examination apart from an invasive medical procedure.

Plaintiff further points to evidence of neurological deficits. This evidence was not available to the ALJ, but was presented to the Appeals Council, as new evidence, during their review of the ALJ's decision. Because new evidence provided to the Appeals Council becomes part of the record, this Court must consider it when determining whether the ALJ's decision was supported by substantial evidence.²⁹ Even though the ALJ did not have this evidence, and consequently did not rely on it, the ALJ's finding of no neurological deficits was not erroneous. The new evidence presented to the Appeals Council was two fold. First, there were nerve conduction studies performed in August 1999, that "were normal except for the absence of the right post tibial F wave." Second, there was a doctor's opinion that plaintiff had chronic bilateral L5 and Left S1 radiculopathies, and was unable to generate a complete recruitment pattern in many muscles attributable to either lack of effort or a lesion higher than the nerve root.

But this new evidence did not present a materially different picture of plaintiff's impairments. An electromyography from March 23, 1998, showed that plaintiff's "F-wave latencies were within normal limits." And, the notes from an August 30, 1999, neurological examination, although handwritten and difficult to decipher, appear to reference "unreliable sensory loss," and state that plaintiff's sensation was

²⁹*Threet v. Barnhart*, 353 F.3d 1185, 1191 (10th Cir. 2003) (citing *O'Dell v. Shalala*, 44 F.3d 855, 859 (10th Cir. 1994)).

intact that day. In short, this Court agrees with the Appeals Council that this additional evidence did not render erroneous, the ALJ's finding of no neurological deficits.

Moreover, although as plaintiff posits, there is evidence of positive straight leg raising tests on March 3 and 31, 1998, and possibly December 23, 1998, there is also evidence of a negative straight leg raising test on September 29, 1998. Because there is conflicting evidence, including a nerve conduction study and electromyography and Dr. Prostin's opinion, and because this was only one part of one factor the ALJ relied on, this conflicting evidence does not diminish the substantial evidence underlying the ALJ's credibility determination.

Plaintiff further asserts that the ALJ erred in relying on the fact that plaintiff had never had surgery or inpatient hospitalization. Plaintiff argues that the ALJ should have complied with the Tenth Circuit's four part test in *Frey v. Bowen*³⁰ for determining when a plaintiff can be found not disabled for failing to follow a prescribed treatment. This test requires among other things for the ALJ to determine whether the treatment at issue would restore plaintiff's ability to work.³¹ However, the Tenth Circuit has held that this test is not required in a situation such as this, when the treatment has not been prescribed and the ALJ is simply considering "what attempts plaintiff made to relieve [her] pain . . . in an effort to evaluate the veracity of plaintiff's contention that [her] pain was so severe as to be disabling."³² Therefore the ALJ did not err in considering this particular factor. Plaintiff also contends that the ALJ erred in discounting her

³⁰816 F.2d 508, 517 (10th Cir. 1987).

³¹*Id.*

³²*Qualls v. Apfel*, 206 F.3d 1368, 1372 (10th Cir. 2000) (citing *Hargis v. Sullivan*, 945 F.2d 1482, 1489 (10th Cir. 1991); *Luna v. Bowen*, 834 F.2d 161, 165-66 (10th Cir. 1987)).

statement that she can only sit for five to ten minutes. The ALJ discounted her statement, based on his observation that plaintiff was able to sit for over an hour at the hearing with no observable problems. Findings based on the ALJ's observations at the hearing, are particularly within the judgment of the ALJ,³³ and this Court has seen no evidence that his judgment was incorrect. Plaintiff denies that she was able to sit that long, stating that before the hearing started, she asked if she could stand, and later during the hearing she asked if she could stand up again. However, the record does not reveal how long the hearing lasted, nor does the transcript record the moment when plaintiff sat down again, nor does it reveal how long she sat before requesting to stand again.

Plaintiff also points out that during the hearing the ALJ stated, “[s]uffice it to say, I am impressed that you are in a great deal of discomfort,” and “as I said, you’re in a great deal of discomfort.” Plaintiff argues that these comments show that plaintiff had “observable problems” during the hearing. However, when the ALJ’s comments are considered in context, it is clear that the ALJ was not commenting on his observations of the plaintiff’s physical distress or discomfort during the hearing. Rather, at one point, the ALJ was commenting on plaintiff’s medical records; at another point the ALJ’s comment was actually a question, punctuated by a question mark. Thus these comments do not contradict the ALJ’s findings concerning his observations at the hearing.

Plaintiff further contends that the ALJ erred in finding that her daily activities are inconsistent with her alleged inability to work. A claimant’s daily activities may be considered in determining whether she is able to engage in substantial gainful employment.³⁴ Here, there was substantial evidence supporting the

³³See *Thompson v. Sullivan*, 987 F.2d, 1482, 1489 (citing *Hargis*, 945 F.2d at 1489).

³⁴*Talbot v. Heckler*, 814 F.2d 1456, 1462 (10th Cir. 1987).

ALJ's findings that plaintiff lives alone, does all her own shopping and errands, is able to care for herself, is able to check on her young nieces and nephews, and is able to do household chores and care for her home. The ALJ noted that plaintiff has to rest between tasks while performing household chores. The ALJ did not mention plaintiff's statements that: whenever possible, she has someone accompany her to the store to assist her while shopping; while shopping she must rest by leaning on the shopping cart; and her son and his girlfriend check on her and help her out occasionally.

Ability to do household chores is not necessarily indicative of ability to work.³⁵ Daily activities must be considered along with other evidence.³⁶ Although plaintiff may have received some help with her daily activities, most of her daily activities are done without help and are done more than occasionally. Viewed in light of the entire credibility determination, plaintiff's activities do not weigh in favor of a finding of disability.

Finally, plaintiff contends that the ALJ erred in not considering the side effects and ineffectiveness of her medications. The ALJ noted the medication plaintiff takes, then stated that "[t]he evidence does not indicate that the medication is ineffective or results in any side effects." Plaintiff argues that the ALJ was relying on a form completed by plaintiff; but the form did not include a space for her to report the side effects of the medication. However, the ALJ referenced "the evidence," indicating he was considering the entire record, not just this form.

There was evidence in the record, that the medication was ineffective or caused side effects. Plaintiff testified that some of her medicine made her feel nauseated, drowsy, groggy, and unable to

³⁵*Cavitt v. Schweiker*, 704 F.2d 1193, 1195 (10th Cir. 1983).

³⁶*Gossett v. Bowen*, 862 F.2d 802, 807 (10th Cir. 1988).

concentrate. She argues that even though these are her subjective complaints of side effects, the ALJ had a duty to discuss the side effects she claimed she was experiencing. She also argues that one reason for not discussing side effects with her doctors would be that they were expected side effects. Notably, plaintiff does not state whether these were in fact expected side effects.³⁷ Plaintiff also testified that Hydrocodone made her break out in hives; but her doctor changed that medication. Plaintiff further testified that the epidural injections and physical therapy did not relieve her pain. Although defendant argues that plaintiff never complained about side effects to her treating physicians, the medical records indicate that several times in February 1998, plaintiff complained that prescribed Darvocet and Duract did not help her pain. When a claimant does not contemporaneously complain of side effects to her treating physicians, that weighs against her credibility.³⁸ But plaintiff did complain about some of the side effects.

The ALJ is required to analyze several factors when determining plaintiff's credibility, including the effectiveness and side effects of plaintiff's medication.³⁹ Although the ALJ failed to discuss the evidence regarding ineffective medication and side effects, this failure does not render erroneous the ALJ's ultimate credibility determination. The ALJ still relied on substantial evidence for his determination that plaintiff's complaints were not fully credible.

In short, the ALJ considered the entire record, set forth the specific evidence he relied upon, applied the correct legal standards in evaluating plaintiff's testimony, and based his determination on substantial evidence in the record as required. Because credibility determinations are ultimately left to the

³⁷See *Stewart v. Chater*, 993 F. Supp. 809, 816 (D. Colo. 1998).

³⁸See *Barrett v. Shalala*, 38 F.3d 1019, 1023 (8th Cir. 1994).

³⁹*Luna v. Bowen*, 834 F.2d 161, 166 (10th Cir. 1987).

ALJ when he has substantial evidence for his determination, the Court finds that the ALJ's decision regarding plaintiff's credibility is not erroneous.

B. Assessment of Plaintiff's RFC

Plaintiff argues that the ALJ's RFC assessment was not proper, his questions to the Vocational Expert (VE) did not include all of plaintiff's limitations, and therefore his determination that plaintiff could perform a significant number of jobs was improper. The ALJ determined plaintiff's RFC included the ability to lift and carry 10 pounds frequently and 20 pounds occasionally; the need to alternate sitting and standing at 30 minute intervals; occasional limitations regarding bending, stooping, kneeling, crouching and crawling; and moderate limitations in the ability to understand, remember, and carry out detailed instructions. Based on this RFC, the VE testified that plaintiff retained the ability to perform jobs such as an order clerk, unit clerk, or production clerk.

Plaintiff claims that the ALJ erred in not including in his RFC assessment, her severe mental impairments and her need to elevate her feet. There is no evidence of plaintiff's need to elevate her feet, other than her own testimony. While plaintiff alleges her doctors instructed her to stay off her legs, there is no evidence in the medical records that plaintiff was so instructed. The ALJ did not err in failing to even mention these alleged limitations; although the ALJ's decision must show that he considered all the evidence, he is not required to discuss every single piece of evidence.⁴⁰ The ALJ is only required to discuss the evidence that supports his decision, any "uncontroverted evidence he chooses not to rely upon, as well

⁴⁰*Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996) (citing *Vincent ex rel. Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984)).

as significantly probative evidence he rejects.”⁴¹ While the ALJ mentioned plaintiff’s contention that she had to rest while doing household chores, without further evidence for her need to elevate her feet, the ALJ did not err in failing to include that limitation in his RFC assessment.

The ALJ did err in finding that plaintiff had depression and merely moderate mental limitations, in her ability to understand, remember and carry out detailed instructions. The ALJ failed to state sufficient evidence supporting this finding; in addition to plaintiff’s testimony, there was other evidence contrary to the ALJ’s finding. Dr. Whitten, a psychologist who examined plaintiff and the medical records, made a narrative assessment of plaintiff’s mental condition, filling out a form titled “Medical Assessment of Ability to do Work-Related Activities (Mental)” (medical assessment). Dr. Whitten reported plaintiff had “poor” ability to understand, remember, and carry out complex job instructions, and a “fair” ability to understand, remember, and carry out detailed, but not complex job instructions. Dr. Whitten further found plaintiff to have “fair” abilities in the areas of dealing with work stress, maintaining attention/concentration, maintaining personal appearance, behaving in an emotionally stable manner, and relating predictably in social situations. Inexplicably, the ALJ did not adopt or discount Dr. Whitten’s opinion.

Moreover, the ALJ’s assessment was internally inconsistent. Although the ALJ noted in his opinion that plaintiff was able to do “simple and detailed work, but would have serious limitations in the ability to understand, remember, and carry out complex job instructions;” in his RFC determination, the ALJ included only a “moderate” limitation in plaintiff’s ability to understand, remember, and carry out detailed instructions.

⁴¹*Id.*

The ALJ and VE typically use the language on the Psychiatric Review Technique Form (PRT form) when deciding whether plaintiff's RFC will allow her to continue to work. The PRT form uses "slight, moderate, marked, and extreme" as opposed to "good, fair, poor, and none" which are used on the medical assessment Dr. Whitten filled out. The Tenth Circuit has held that what is defined as "poor" on the medical assessment—ability to function is seriously limited but not precluded—is equivalent to a "marked" limitation.⁴²

However, the ALJ did not include any limitation regarding complex instructions in his RFC nor did he ask the VE how such limitation would affect plaintiff, even though Dr. Whitten found plaintiff to have poor abilities in that area. It would appear that "fair" would be equivalent to "moderate," and it appears the ALJ believed that to be true with respect to plaintiff's ability to perform detailed instructions. However, the ALJ also chose to include only one of Dr. Whitten's "fair" determinations and ignored the rest without giving an explanation. The Court directs the ALJ on remand to make further findings with regard to plaintiff's mental RFC in conjunction with Dr. Whitten's report and plaintiff's statements.

Plaintiff further argues that Dr. Whitten's findings on the medical assessment were not consistent with his narrative that accompanied those findings. Where the two seem inconsistent, it is proper for the ALJ to consider them both in light of the rest of the record and determine which is more persuasive.⁴³ On remand, we urge the ALJ to make further findings regarding Dr. Whitten's entire analysis of plaintiff's mental impairments.

⁴²*Cruse v. Dep't of Health & Human Servs.*, 49 F.3d 614, 618 (10th Cir. 1995).

⁴³*See Dukes v. Apfel*, No. 98-6031, 1998 WL 476770, *3 (10th Cir. Aug. 11, 1998) (pursuant to 10th Cir. Rule 36.3(B)(1), the court cites this unpublished opinion for its persuasive value).

Plaintiff's final argument is that the ALJ's hypothetical questions, eliciting the VE's testimony that there were jobs existing in the national economy that plaintiff remained capable of performing, failed to include all of plaintiff's limitations and, thus, the VE's testimony fails to constitute substantial evidence supporting the denial of benefits. A VE's testimony can provide a proper basis for an ALJ's determination where the claimant's impairments are reflected adequately in the hypothetical inquiries to the expert.⁴⁴ The ALJ, however, is required to accept and include in the hypothetical question only those limitations supported by the record.⁴⁵ Because the ALJ did not make a proper finding regarding plaintiff's mental RFC, the Court finds that it is possible that the VE's testimony was incomplete.

V. Conclusion

Therefore, the Court finds that this action should be reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to conduct further proceedings as follows:

Upon receiving the court's final order of remand, the Appeals Council of the Social Security Administration will remand this case and direct the ALJ to reassess the severity of plaintiff's impairments, in accordance with the statute and regulations, including the evaluation of plaintiff's mental RFC. The ALJ will further consider the records and opinion of the examining physician, Dr. Whitten, and plaintiff's testimony regarding her mental impairment. The ALJ will give specific reasons for his resultant findings. The ALJ will reassess plaintiff's ability to perform a significant amount of jobs in the national economy after reexamining his conclusions about plaintiff's RFC.

IT IS THEREFORE ORDERED BY THE COURT THAT defendant's decision denying plaintiff disability benefits is **REVERSED AND REMANDED** pursuant to the fourth sentence of 42 U.S.C. § 405(g) for further proceedings in accordance with this Memorandum and Order.

⁴⁴*Gay v. Sullivan*, 986 F.2d 1336, 1341 (10th Cir. 1993).

⁴⁵*Shepherd v. Apfel*, 184 F.3d 1196, 1203 (10th Cir. 1999).

IT IS SO ORDERED.

Dated this 21st day of May, 2004, at Topeka, Kansas.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge

[**MEMORANDUM & ORDER** - Stinson v. Barnhart, Case No. 02-4084]